No. 15-1358, 15-1359, 15-1363

In the Supreme Court of the United States

JAMES W. ZIGLAR, Petitioner,
v.
AHMER IQBAL ABBASI, ET AL., Respondents.

JOHN D. ASHCROFT,
Former Attorney General, ET AL., Petitioners,
v.
AHMER IQBAL ABBASI, ET AL., Respondents.

DENNIS HASTY, ET AL., Petitioners,
v.
AHMER IQBAL ABBASI, ET AL., Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF KAREN KOREMATSU, JAY HIRABAYASHI, AND HOLLY YASUI AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 5

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

I. SEPTEMBER 11 TRIGGERED A RAGE AGAINST MUSLIMS AND ARABS THAT PERSISTS TO THIS DAY 11

II. PETITIONERS TARGETED RESPONDENTS BECAUSE THEY WERE PERCEIVABLY MUSLIM OR ARAB, IN VIOLATION OF CLEARLY ESTABLISHED LAW 16

A. In the Civil Context, the Law is Clearly Established That Executive Officers May Not Act Against Prisoners or Detainees Based on Their Religion or Ethnicity 18

1. Due Process 20

2. Equal Protection 21

B. Even In the Wartime Context, Executive Officers Clearly May Not Act Against Prisoners or Detainees Based on Their Religion or Ethnicity Without the Most Compelling Justification—A Showing That Has Not Been Made 23

TABLE OF CONTENTS – Continued

Page

III. BECAUSE NO REASONABLE OFFICER WOULD HAVE CONSIDERED IT LAWFUL TO TARGET PEOPLE BASED ON THEIR RELIGION OR ETHNICITY, PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY, EVEN IF THE CONTEXT WERE NOVEL 29

A. The Qualified Immunity Doctrine Developed to Protect Reasonable Mistakes and is Not Distinct From the Demands Placed on a Reasonable Officer 30

B. If Adopted, The Court Should Remand for Application of the "No Reasonable Person" Standard 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) 28

Anderson v. Creighton,
483 U.S. 635 (1987) 32, 35, 36

Ashcroft v. Al-Kidd,
563 U.S. 731 (2011) 34

Ashcroft v. Turkmen,
No. 15-1359, 2016 U.S. LEXIS 6272 (2016) 8

Bell v. Wolfish,
441 U.S. 520 (1979) 20

Brown v. City of Oneonta, N.Y.,
221 F.3d 329 (2d Cir. 2000) 22

Davis v. Ayala,
135 S.Ct. 2187 (2015) 16

Dennis v. Sparks,
449 U.S. 24 (1980) 30

Graham v. Connor,
490 U.S. 386 (1989) 30

Groh v. Ramirez,
540 U.S. 551 (2004) 33

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 28

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 32

TABLE OF AUTHORITIES—Continued

Page

Hasty v. Turkmen,
No. 15-1363, 2016 U.S. LEXIS 6273 (2016) 9

Hernandez v. Texas,
347 U.S. 475 (1954) 16

Hirabayashi v. United States,
320 U.S. 81 (1943) ..... passim

Hirabayashi v. United States,
828 F.2d 591 (9th Cir. 1987) 2, 4, 25

Hope v. Pelzer,
536 U.S. 730 (2002) 34

Hudson v. McMillian,
503 U.S. 1 (1992) 31

Korematsu v. United States,
323 U.S. 214 (1944) ..... passim

Korematsu v. United States,
584 F. Supp. 1406 (N.D. Cal. 1984) ..... passim

Lareau v. Manson,
651 F.2d 96 (2d Cir. 1981) 20, 21

Loving v. Virginia,
388 U.S. 1 (1967) 16

Monroe v. Pape,
365 U.S. 167 (1961) 30, 31

Oyama v. California,
332 U.S. 633 (1948) 16

Personnel Administrator of Mass. v. Feeney,
442 U.S. 256 (1979) 21

TABLE OF AUTHORITIES—Continued

Page

Pierson v. Ray,
386 U.S. 547 (1967) 30, 31, 35

Plessy v. Ferguson,
163 U.S. 537 (1896) 26

Saucier v. Katz,
533 U.S. 194 (2001) 35

Schuer v. Rhodes,
416 U.S. 232 (1974) 31, 35

Scott v. Sanford,
60 U.S. 393 (1856) 26

Turkmen v. Ashcroft,
915 F.Supp.2d 314 (S.D.N.Y. 2013) 8

Turkmen v. Hasty,
789 F.3d 218 (2d. Cir. 2015) ..... passim

Turkmen v. Hasty,
808 F.3d 197 (2d. Cir. 2015) 8

Turkmen, et al. v. Ashcroft, et al.,
No. 02 CV 2307 (JG)(SMG)
2010 WL 6000431 (E.D.N.Y. 2010) 5

United States v. Lanier,
520 U.S. 259 (1997) 34

Williams v. Prudden,
67 Fed. Appx. 976, 2003 WL 21135681
(8th Cir. 2003) 19

Wilson v. Layne,
526 U.S. 603 (1999) 30, 32, 33

TABLE OF AUTHORITIES—Continued

Page

Yasui v. United States,
320 U.S. 115 (1943) 1, 10, 26, 27

Yasui v. United States,
D. Or. Crim. No. C 16056
(D. Or. Jan. 26, 1984) 2, 4, 25

Ziglar v. Turkmen,
No. 15-1363, 2016 U.S. LEXIS 6273 (2016) 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 32, 33

U.S. Const. amend. V 20, 21

U.S. Const. amend. XIV 32

STATUTES

42 U.S.C § 1983 ..... 30, 31

50A U.S.C. § 1989a(a) 4, 25

JUDICIAL RULES

Sup. Ct. R. 37.3(a) 1

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TABLE OF AUTHORITIES—Continued

Page

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Douglas A Blaze,
Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation, 31 WM. & MARY L. REV. 935 (1990) 31

Earl Warren,
The Memoirs of Earl Warren (1977) 4, 26

Eric K. Yamamoto, et al.,
Race, Rights and Reparation: Law and the Japanese American Internment (2013) 26, 28

Hate Crime Reports Up in Wake of Terrorist Attacks, CNN, Sept. 17, 2001, http://edition.cnn.com/2001/US/09/16/gen.hate.crimes/ 12

Henry McLemore,
Why Treat the Japs Well Here, SAN FRANCISCO EXAMINER, Jan. 19, 1942 12

TABLE OF AUTHORITIES—Continued

Page

Ilir Disha, James C. Cavendish & Ryan D. King, *Historical Events and Spaces of Hate: Hate Crimes against Arabs and Muslims in Post-9/11 America*, 58 SOC. PROBS. 21 (2011) 13, 14

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Page

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Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976) 4, 24

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U.S. Comm'n on the Wartime Relocation and Internment of Civilians, Congress of 1980, *Report: Personal Justice Denied* (1982) 25

INTEREST OF *AMICI CURIAE* [1]

Amici are the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, three American citizens of Japanese ancestry. As young men during World War II, these three challenged the constitutionality of the military orders subjecting Japanese Americans to curfew, forced removal, and incarceration for the duration of the war in government internment camps in desolate areas of the nation's interior. Deferring to the government's claim of military necessity, and failing to scrutinize the basis for the government's actions, the Court affirmed their criminal convictions for defying the military orders, placing its stamp of approval on one of the most sweeping deprivations of constitutional liberties in American history. *See Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

Forty years later, Korematsu, Hirabayashi, and Yasui successfully reopened their cases and had their wartime convictions vacated based on proof that the government had suppressed, altered, and destroyed military and civilian intelligence which directly refuted its claim that military necessity justified the wartime internment of Japanese Americans. *Korematsu*

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for a party authored the brief in whole or in part and neither such counsel nor a party made a monetary contribution intended to fund the brief's preparation or submission. S. Ct. Rules 37.3(a), 37.6.

v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *affirming in part and reversing in part*, 627 F. Supp. 1445 (W.D. Wash. 1986); Order, *Yasui v. United States*, D. Or. Crim. No. C 16056, at 2 (D. Or. Jan. 26, 1984) (granting government's motion to vacate conviction and dismissing petition), *rev'd and remanded on other grounds*, 772 F.2d 1496 (9th Cir. 1985). These men showed that Internment was far more than an unfortunate "mistake," as many had concluded, but was the product of a pervasive and deliberate abuse of power.

Korematsu, Hirabayashi, and Yasui, and their children, *amici* here, know firsthand the stigmatizing damage that ensues when the judicial system, pressured by a purported national emergency, accepts an ostensibly proper government interest as sufficient to justify express racial and other classifications without subjecting those justifications to the strictest scrutiny. Although Congress eventually issued a formal apology, *amici* also know that such apologies come far too late and provide far too little to make up for the personal and constitutional harm suffered.

Honoring their fathers' legacies, *amici* have committed themselves to ensuring both that other marginalized and socially disfavored groups never again suffer the unjust stigma of officially-endorsed prejudice, and that the courts faithfully and rigorously scrutinize such invidious and destructive classifications.

Amici are deeply concerned with the disturbing parallels between the challenged conduct here and

the wrongful actions taken against Japanese Americans. In 1942, solely because of their race/ethnicity, over 110,000 persons of Japanese ancestry, over two-thirds American citizens, were forcibly removed from their homes on the West Coast. Without charges, trials, or convictions, they were confined for the duration of WWII in internment camps scattered among the most desolate regions of the country. In 2001, solely because of their actual or perceived national origin/ethnicity/religion, hundreds of Muslim and Arab men were indefinitely detained after 9/11 on minor immigration infractions or low level criminal charges. They were confined under an oppressive "hold-until-cleared" policy and were deliberately subjected to "extremely restrictive conditions of confinement," though there was no evidence tying them to terrorism. Some were held even after they had been cleared of such alleged ties.

The Petitioners claim they are immune and insist the Respondents' constitutional rights were not "clearly established" because the circumstances following 9/11 were "novel." To the contrary, the Petitioners' conduct was all too familiar and the constitutional harm all too predictable. Petitioners' abuse of the people detained indeed had an antecedent, one *amici see* all too clearly, in the Japanese American Internment (the "Internment").

Ever since the *Korematsu* dissenters named it for what it was, a "descent into the ugly abyss of racism," *see Korematsu*, 323 U.S. at 233 (Murphy, J. dissenting), the Internment has been condemned as the single most egregious violation of civil rights and liberties in the last century. *See* Arg. II.B, *infra*; Proclamation No.

4417, 41 Fed. Reg. 7741 (Feb. 19, 1976) (President Ford rescinds Executive Order 9066); U.S. Comm'n on the Wartime Relocation and Internment of Civilians, Congress of 1980, *Report: Personal Justice Denied*, at 18 (1982) (finding Internment lacked any national security basis, but was the product of "race prejudice, wartime hysteria and a failure of political leadership"); Civil Rights Act of 1988, 50A U.S.C. § 1989a(a) (Congress adopted CWIRC's findings and issued a formal apology to the surviving internees); Earl Warren, *The Memoirs of Earl Warren* 149 (1977) (characterizing Internment as the result of "fear, get-tough military psychology, propaganda, and racial antagonism"); *see also Korematsu*, 584 F. Supp. 1406; *Hirabayashi*, 828 F.2d 591 and 627 F. Supp. 1445; Order, *Yasui*, D. Or. Crim. No. C 16056, at 2 (vacating *amici's* fathers' wartime convictions based on government's fraud on the courts).

This is Petitioners' antecedent—an egregious wrong we promised would never happen again. The right to be free from government oppression based on race, ethnicity, national origin, or religion lies at the heart of who we claim to be and who we are as a nation. The law flouted by Petitioners could not be more clearly established. The decision of the Second Circuit should be affirmed.

STATEMENT OF THE CASE

Respondents represent a class of foreign nationals arrested, detained, and abused by Petitioners because they are, or were perceived to be, Arab or Muslim. Complaint at ¶¶ 1, 3, 4, 61, 65, 68, 74-78, *Turkmen, et al. v. Ashcroft, et al.*, 2010 WL 6000431 (E.D.N.Y.) (Trial Pleading) (No. 02 CV 2307 (JG)(SMG)) (herein "Compl."). Though they were held during Petitioners' investigation into the attacks of September 11, they "were unquestionably never involved in terrorist activity." *Turkmen v. Hasty*, 789 F.3d 218, 223 (2d. Cir. 2015). Yet they were deliberately mistreated by the Petitioners and those acting on their behalf because of their religion or ethnicity.

Respondents' brief sets out the facts in detail. It suffices to observe that Petitioners' investigation into the September 11 attacks cast an exceptionally wide net. Petitioners Ashcroft, Mueller, and Ziglar created a policy that called for the automatic arrest of male, Muslim or Arab foreign nationals who were not in strict compliance with the terms of their visas, regardless of whether they had a connection to terrorism. Compl. at ¶¶ 1, 4, 39-49.

Respondents, like hundreds of other perceivably Arab or Muslim men, were arrested for minor immigration violations. Compl. at ¶¶ 1, 49, 51. Commonly, this amounted to having overstayed their visas. *Id.* Others were arrested for insignificant violations of the criminal code. Called upon to defend what the NEW YORK TIMES called the "spitting on the sidewalk policy," Petitioner Ashcroft demurred, saying

only that, "It is difficult for a person in jail or under detention to murder innocent people or to aid or abet in terrorism." Philip Shenon & Don Van Natta, Jr., *A Nation Challenged: The Investigation; U.S. Says 3 Detainees May Be Tied to Hijackings*, NEW YORK TIMES, Nov. 1, 2001, http://www.nytimes.com/2001/11/01/us/nation-challenged-investigation-us-says-3-detainees-may-be-tied-hijackings.html.

Upon arrest, Respondents were subjected to a "hold-until-cleared" policy. Compl. at ¶¶ 2, 51-60. This consisted of Petitioners' conscious decision to detain Respondents without bond or just cause for a period far longer than they would have been detained on their immigration or criminal charges alone. *See id.* In some instances, detainees were arrested and held even after they had been cleared of any connection to terrorism. *See, e.g.* Joint Appendix (JA) 104-05, 141-42 (Office of Inspector Gen., U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003), https://oig.justice.gov/ special/0306/full.pdf ("OIG Report")).

Respondents were confined at the Metropolitan Detention Center ("MDC") in New York, where they were held under exceptionally severe conditions. JA 341-42 (Office of Inspector Gen., U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003), http://www.usdoj.gov/oig/special/0312/final.pdf ("Supplemental OIG Report"). When MDC officials learned they would receive aliens who might be suspects in

the September 11 attacks, Petitioner Hasty ordered that a pre-existing secure unit in the facility be converted into an "Administrative Maximum Special Housing Unit" ("ADMAX SHU"), and directed his subordinates to design "extremely restrictive conditions of confinement." Compl. at ¶¶ 24, 75; *see also id.* at ¶ 76 (describing the conditions in the ADMAX SHU). Petitioners Hasty and Sherman imposed these harsh conditions even though they knew "the FBI had not developed any information to tie the [Respondents] . . . to terrorism." *Id.* at ¶ 69.

Petitioners ordered that some detainees be held in solitary confinement, though they presented no risk and violated no rules. JA343. Detainees remained in their cells at least 23 hours a day, cut off from virtually all human contact. Until late February 2002, the cells were constantly illuminated. *Id.* At Petitioner's discretion, MDC officials deliberately prevented the Respondents from communicating with each other and with the outside world, including counsel. Compl. at ¶¶ 79-82; JA 72, 220-224.[2]

Within the facility, abuse was widespread. The OIG found that a "significant number" of MDC staff members repeatedly subjected the detainees to physical and verbal abuse. JA 350-51. Detainees were slammed against walls, doors, and the insides of elevators. *Id.* at 351-64. Their arms, hands, wrists, and fingers were bent and twisted. *Id.* at 364-67. They were dragged or lifted off the ground by their restraints. *Id.* at 367-70. They were punched, kicked, and beaten. *Id.* at

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[2] For a more complete recitation of the facts surrounding the use of solitary confinement, *see* Brief of Medical Professionals as *Amici Curiae* in Support of Respondents and Affirmance, 2-5.

380-83. On one occasion, a staff member threatened to "break [a detainee's] neck." *Id.* at 351, 384. They were subjected to degrading and sexually humiliating strip searches. *Id.* at 391-95. When detainees tried to pray, officers mocked and ridiculed them, hollering to "Shut the fuck up!" *Id.* at 384-85. One officer referred to the detainees as "[f]ucking Muslims," while another taunted them, ordering, "Don't pray. You're praying bullshit." *Id.* Petitioner Hasty knew of these and other related abuses, yet he allowed them to continue. Indeed, he facilitated them. Compl. at ¶¶ 24, 77–78, 107, 109–10.

Respondents brought suit in the Eastern District of New York. After extended proceedings, the district court granted the DOJ Defendants' motions to dismiss in their entirety and granted the MDC Defendants' motions with respect to the communications blackout and interference with counsel. *Turkmen v. Ashcroft*, 915 F.Supp.2d 314, 358 (S.D.N.Y. 2013). Reversing, the Second Circuit held, *inter alia*, that the Respondents had alleged violations of substantive due process and equal protection by Petitioners, who were not entitled to qualified immunity. *Turkmen v. Hasty*, 789 F.3d at 265.

Judge Raggi concurred in part and dissented in part, arguing that Petitioners should be immune. *Id.* at 280-302. Subsequently, the Second Circuit, sitting *en banc*, denied a motion for rehearing by an equally divided vote. *Turkmen v. Hasty*, 808 F.3d 197 (2d. Cir. 2015). This Court granted certiorari on October 11, 2016. *Ashcroft v. Turkmen*, No. 15-1359, 2016 U.S. LEXIS 6272 (2016); *Hasty v. Turkmen*, No. 15-1363,

2016 U.S. LEXIS 6273 (2016); *Ziglar v. Turkmen*, No. 15-1363, 2016 U.S. LEXIS 6273 (2016).

SUMMARY OF THE ARGUMENT

Amici agree with the Respondents and the majority below that the Petitioners are not entitled to qualified immunity. For months, Petitioners mistreated Respondents for no reason other than a discriminatory animus against Muslims and Arabs. We understand that in moments of crisis, our government may move decisively to ensure the safety of the nation. But regardless of their subjective motive, Petitioners did not act to protect national security; they acted to punish Muslims and Arabs. In this Court, Petitioners do not contend their actions were legal, and nor should they. The law has been clearly established for many years that an executive officer may not take action against a person based upon the color of their skin or their house of worship. Petitioners violated this bedrock command and cannot be immune.

In the civil context, Petitioners' determination to abuse Respondents because they were perceivably Arab or Muslim violated clearly established due process and equal protection guarantees. Regarding due process, discriminatory animus has no reasonable relation to a legitimate penal goal, and led in this case to exceedingly severe conditions of confinement that were arbitrary and purposeless. Regarding equal protection, Petitioners' policies were motivated by a discriminatory intent that indisputably had an adverse effect on Respondents.

In the wartime context, the notion that an unexamined exigency can justify discrimination has rightfully drifted to the fringes of American jurisprudential thought. The law has long since absorbed the true lesson of *Korematsu*, *Hirabayashi*, and *Yasui*: the Siren Song of national security cannot justify discrimination against a protected class without the most searching judicial inquiry. Because that inquiry has not yet occurred, the case must proceed.

Alternatively, even if the Court concludes this case presents a "novel" context, that alone does not render Petitioners immune. Historically, qualified immunity doctrine has strived to distinguish reasonable mistakes from unreasonable violations. Thus, officials who behave in a way that no reasonable officer would consider lawful do not deserve immunity, regardless of the novelty of the context. Because no reasonable officer would have considered it lawful in 2001 to discriminate against detainees merely because they were or were thought to be Arab or Muslim, Petitioners cannot be immune.

A temporary state of crisis need not become an unexamined state of nature. The Court should uphold the Second Circuit and affirm that the Constitution's spirit of equality remains robust—especially in moments of national tragedy.

ARGUMENT

I. SEPTEMBER 11 TRIGGERED A RAGE AGAINST MUSLIMS AND ARABS THAT PERSISTS TO THIS DAY

Amici recall the terror attacks of September 11, 2001, with the same mix of anger, sadness, and loss as all Americans. But no accounting of that day—historical, legal, or moral—is complete unless we also remember what followed. To forget the wrongs done in the aftermath is to risk the worst form of nationalist hagiography.

As too often happens, a great many were made to pay for the actions of a very few. In 1942, in the wartime hysteria following the bombing of Pearl Harbor, the country turned on Japanese Americans. "Japanese gardeners were said to be equipped with short-wave transmitters hidden in garden hose[s]; . . . [and a] number of anxious Californians . . . went so far as to plow up [a] field of flowers on the property of a Japanese farmer, [believing] 'the Jap . . . had grown his flowers in a way that when viewed from a plane formed an arrow pointing the direction to the airport.'" Jacobus tenBroek, et al., *Prejudice, War, and the Constitutions*70 (1954) (citing LOS ANGELES HERALD, 12/9/41; SACRAMENTO BEE, 12/17/41; SAN FRANCISCO EXAMINER, 12/29/41); *see also* Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II* 32-34 (1972) ("Daniels") (discussing news reports of purported Japanese espionage and sabotage in the aftermath of Pearl Harbor).

This hysteria was followed by increasing demands that the government remove Japanese

Americans from the West Coast. *See, e.g.*, Henry McLemore, *Why Treat the Japs Well Here*, SAN FRANCISCO EXAMINER, Jan. 19, 1942 ("I am for the removal of every Japanese on the West Coast to a point deep in the interior.") On January 30, 1942, members of the West Coast Congressional delegation urged the War Department to "develop and consummate as soon as possible . . . complete evacuation and resettlement or internment of all enemy aliens and dual citizens." Yet, despite this fear, "[t]here was not one demonstrable incident of sabotage committed by a Japanese American, alien or native born, during the entire war." Daniels at 33 (internal citations omitted).

Here, as in 1942, those who shared a skin shade or religion with the attackers quickly felt the wrath of an inflamed public. Immediately after September 11, reports of hate crimes and violence against Muslims and Southeast Asians rose "exponentially." *Hate Crime Reports Up in Wake of Terrorist Attacks*, CNN, Sept. 17, 2001, http://edition.cnn.com/2001/US/09/16/gen.hate.crimes/.

By Thanksgiving 2001, well over 1,200 bias incidents had been reported against Arabs, Muslims, and South Asians. Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1261, 1261, 1266 (2004). Within six months of the attacks, the Council on American-Islamic Relations [CAIR] had received more than 1,700 reports of harassment, violence, and related discriminatory acts. Mohamed Nimer, *Muslims in America After 9-11*, J. ISLAMIC L. & CULTURE, Fall/Winter 2002, 1 at 18. According to the FBI, anti-

Muslim hate crime increased 1,600 percent between the years 2000 and 2001. Ilir Disha, James C. Cavendish & Ryan D. King, *Historical Events and Spaces of Hate: Hate Crimes against Arabs and Muslims in Post-9/11 America*, 58 SOC. PROBS. 21, 21-22 (2011).

Mosques were attacked or threatened. Nimer, *supra*, at 18. Workplace discrimination complaints soared. Muslim women feared covering their heads in public, and some asked religious scholars whether mortal fear could excuse them of the obligation to wear a head scarf. *Id.* at 19. In the summer of 2002, an 18-year-old man raped a 15-year-old girl inside a drug store while making anti-Muslim comments. *Id.* at 18. In the post-9/11 climate, this violence became "accepted as a regrettable, but expected, response to the terrorist attacks." Ahmad, *supra*, at 1262. Tellingly, prior to September 11, the law understood hate crime killings as crimes of moral depravity; after the attacks, they were viewed as crimes of passion. *Id.* at 1263.

This animosity persisted. While hate crimes against most groups remained flat or declined in the years before and after September 11, crimes against Arabs and Muslims spiked after the attacks. By 2015, they remained five times more common than they were before September 11. Christopher Ingraham, *Anti-Muslim Hate Crimes Are Still Five Times More Common Today Than Before 9/11*, WASH. POST (Feb. 11, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/11/anti-muslim-hate-crimes-are-still-five-times-more-common-today-than-before-11/?utm_term=.d0ccca22b0c0.

In 2015, hate crimes against Muslims represented roughly 13 percent of all religiously-motivated hate crime in the United States, a finding "consistent with reports from the FBI and from Arab advocacy organizations suggesting that 9/11 created a climate in which many Americans felt united against a 'new enemy.'" *Id.* In this new moment of fear and suspicion, "acts of hatred against Arabs and Muslims became 'normalized.'" Disha et al., *supra*, at 33. And this occurred before the leap in Islamophobic rhetoric and violence unleashed during the 2016 presidential campaign.[3]

In the anxious aftermath of the 9/11 attacks, pollsters tried to measure the extent of the animosity toward the "new enemy." Shortly after the attacks, 43 percent of respondents thought they would become more suspicious of Arabs; an even higher percentage believed the attacks represented the true desires and feelings of Muslim Americans toward the United States. Ahmad, *supra*, at 1298 n. 178 (citing Lisa Ferraro Parmalee, *Intergroup Relations Before and After 9/11: a Review of the Public Opinion Data* 34-38 (The Nat'l Conference for Community and Justice 2002) (summarizing various polls regarding civil liberties in the wake of 9/11)).

Unsurprisingly, many Americans began to support measures calculated to isolate and scrutinize people who "looked" Arab. Nearly six in ten Ameri-

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[3] For a more complete accounting of the anti-Muslim violence in this country since September 11, including the vitriol inspired by the 2016 election, *see* Brief of *Amici Curiae* Asian Americans Advancing Justice and Other Organizations in Support of Respondents.

cans favored intensive security checks for Arabs, and about half favored special identification cards. Nicole Davis, *The Slippery Slope of Racial Profiling: From the War on Drugs to the War on Terrorism*, COLORLINES, Dec. 2001, https://www.colorlines.com/articles/slippery-slope-racial-profiling. "Arab looking" airline passengers, including some who were South Asian and Latino, were ordered to deplane because fellow passengers and crew members refused to fly with them aboard. Sikh men were denied the right to board unless they removed their turbans. *Id.*

Before 9/11, nearly 80 percent of Americans opposed racial profiling; afterwards, 70 percent believed that racial profiling was not only acceptable, but necessary. *Id.* Other Americans favored an even more aggressive approach. According to one poll, taken days after the attacks, one in five respondents reported making comments like, "[w]e should just nuke them." Ahmad, *supra*, at 1297-98 (citing Linda J. Skitka, et al., *Political Tolerance and Coming to Psychological Closure Following the September 11, 2001 Terrorist Attacks: An Integrative Approach*, PERSONALITY & SOC. PSYCHOL. BULL. (2004)).

But as legal scholar Muneer Ahmad recalls, this was not simply the random violence of an enraged minority. As the treatment Respondents endured makes all too plain, it was "a rage shared by law." Petitioners Ashcroft, Mueller, and Ziglar deliberately conceived and implemented a plan to arrest and detain foreign-born Muslim and Arab men based solely on their real or perceived religion or ethnicity. Inside the MDC, Petitioners Hasty and Sherman deliberately subjected Respondents and others like them to abusive conditions

and gratuitous punishments. Some were held in solitary confinement, "a further terror and peculiar mark of infamy." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (quoting *In re Medley*, 134 U.S. 160 (1890)). Many more were beaten, taunted, and harassed. All were held virtually *incommunicado*. None had any connection to terrorism, a fact quickly known but just as quickly dismissed by Petitioners as irrelevant. *Turkmen v. Hasty*, 789 F.3d 218, 223 (2d. Cir. 2015).

II. PETITIONERS TARGETED RESPONDENTS BECAUSE THEY WERE PERCEIVABLY MUSLIM OR ARAB, IN VIOLATION OF CLEARLY ESTABLISHED LAW

The core of this case is Respondents' allegation that Petitioners acted against them not because of legitimate concerns over national security, but because Respondents are, or were believed to be, Arab or Muslim. Actions taken against individuals "solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Oyama v. California*, 332 U.S. 633, 646 (1948) (internal citations omitted); *Hernandez v. Texas*, 347 U.S. 475, 478 n. 4 (1954) (internal citations omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (internal citations omitted). On those few occasions when the Court has not paid sufficient heed to this maxim, both Court and country have come to regret it. Indeed, in an irony not lost on *amici*, these words—so often repeated by the Court—

first appeared in *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).[4]

Yet despite this allegation's simplicity, Petitioners claim they are immune. Significantly, Petitioners do not assert that their actions were or are legal. Rather, they argue that the "national security context" for their discrimination was "novel," and therefore their behavior did not run afoul of clearly established law in 2001. Brief for Petitioners at 31-34, 37-38, *Ashcroft v. Abbasi, et al.*, (No. 15-1359); Brief for Petitioners Dennis Hasty and James Sherman at 34-36, *Hasty v. Abbasi, et al.*, (No. 15-1363); Brief of Petitioner James W. Ziglar at 22, *Ziglar v. Abbasi, et al.*, (No. 15-1358). Petitioners are mistaken in two respects.

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[4] *Amici* confine their discussion to the actions taken by Petitioners against Respondents because they were, or were believed to be, Arab or Muslim. *Amici* recognize that the Respondents raised diverse legal claims involving distinct standards. But as the majority below recognized, Petitioners' discriminatory intent is at the core of Respondents' allegations and common to multiple claims. *See, e.g., Turkmen v. Hasty*, 789 F.3d 218 at 248 ("the challenged conditions were not simply restrictive; they were punitive: there is no legitimate governmental purpose in holding someone as if he were a terrorist simply because he happens to be, or appears to be, Arab or Muslim."); *id.* at 252-53 ("in view of our analysis of Plaintiffs' substantive due process claim against the DOJ Defendants . . . , we hold that the MDC Plaintiffs have adequately alleged an equal protection claim against Ashcroft, Mueller, and Ziglar"); *id.* at 259 ("it was clearly established at the time of Plaintiffs' detention that it was illegal [for Hasty and Sherman] to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin.").

First, they misconceive Respondents' claims. National security has been specifically excluded by Respondents' plausible and well-documented allegations. Petitioners may be able to show later that they acted for reasons other than discriminatory animus. At this point, however, the Complaint credibly indicates otherwise. This renders the qualified immunity question perfectly straightforward.

In the civil context, the law is clearly established that police officers and jailers cannot detain and mistreat prisoners based on irrelevant characteristics like religion or ethnicity. And in the wartime context, the law is clearly established that race or ethnic classifications ostensibly based on national security must be subjected to the most searching judicial scrutiny, a scrutiny that has not yet taken place.

Second, even if the case were "novel" in the way Petitioners suggest, they are still not immune, since no reasonable officer could have considered it lawful to discriminate against Respondents based on their religion or ethnicity, regardless of the context.

A. In the Civil Context, the Law is Clearly Established That Executive Officers May Not Act Against Prisoners or Detainees Based on Their Religion or Ethnicity

Respondents have credibly alleged that Petitioners acted as they did not because they had evidence purporting to link Respondents to 9/11 or terrorism, but because of Respondents' real or perceived religion or ethnicity. This in turn led Petitioners to commit a number of constitutional torts, including violations of

equal protection and substantive due process. On the present complaint, therefore, national security is no more relevant than the fact that the abuses took place in New York rather than New Hampshire. Simply, the fact that the abuses took place during a national security investigation does not make them a legitimate part of a national security investigation.

To make this argument even plainer, suppose Respondents alleged they had been systematically raped as part of their detention at the MDC. Presumably, Petitioners would not suggest that the assaults had been a legitimate part of a national security investigation, even though they took place during a national security investigation. Likewise, a court would have no trouble concluding the rapists were unprotected by qualified immunity, despite the "novel" national security context in which the assaults took place. *See, e.g., Williams v. Prudden*, 67 Fed. Appx. 976, 2003 WL 21135681 (8th Cir. 2003) ("Any reasonable corrections officer would have known in January 1999 that sexually assaulting an inmate would violate the inmate's constitutional rights").

In short, to elevate national security as the only possible explanation for the wrongs committed, despite plausible and well-supported allegations to the contrary, examines the case through the wrong lens. Perhaps Respondents will not be able to prove their claims, but as the majority below properly recognized, to accept at this point that national security explains and excuses Petitioners' actions, to the irrefutable exclusion of other plausible and well-pled explanations, would be error. *Turkmen v. Hasty*, 789 F.3d at 244-45.

Viewed in its proper light, therefore, the case is a civil action for which the law is abundantly well settled. As the lower court correctly held, both substantive due process and equal protection prohibit a government official from taking action against a detainee simply because of his religion or ethnicity.

1. Due Process

The Fifth Amendment forbids the punitive treatment of pretrial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16 (1979). Detainees can establish a due process violation by showing "an expressed intent to punish," *Bell*, 441 U.S. at 538, or by establishing that jailers created conditions of confinement "not reasonably related to a legitimate goal"—that is, conditions that are "arbitrary or purposeless." *Id.* at 539.

These principles are neither recent nor controversial. More importantly, they had been repeatedly applied in the Second Circuit by the time Petitioners acted in this case. This case law yielded a coherent legal regime that made it obvious due process disallowed the conditions imposed on Respondents merely because they were perceivably Arab or Muslim.

In *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981), for instance, the court of appeals held that imprisoning "healthy and non-disruptive" pretrial inmates in an over-crowded jail for more than two weeks in order to save the expense of building a new facility constituted "unconstitutional punishment." *Id.* at 104-05. Yet the deprivations in this case were in all respects more egregious, and the conditions more severe, than in *Lareau*.

In *Lareau*, the inmates were double-bunked but could leave their cells during the day, unrestrained, for an open area or recreation yard, *id.* at 100-01; here, Respondents were held in solitary confinement 23 hours a day, deprived of nearly all human contact, and left their cells only in shackles. In *Lareau*, the great majority of the plaintiffs were held for relatively brief periods, *id.* at 101-02 (nearly three-quarters of inmates spent 30 days or less in jail); here, Respondents were held for anywhere from three to eight months. In *Lareau*, the conditions were imposed to save money, a reasonable if not determinative goal for any state actor, *id.* at 104; here, the conditions were imposed because Petitioners had a discriminatory animus against Muslims and Arabs, an unreasonable goal for every state actor. Plainly, if the conditions in *Lareau* represented "unconstitutional punishment," so too did the conditions here, as Petitioners had to know at the time they acted.

2. Equal Protection

The Fifth Amendment likewise clearly prohibits a state "decision-maker" from "select[ing] or reaffirm[ing] a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). By the time Petitioners acted in this case, the Second Circuit had translated this standard into a clear legal test. Plaintiffs demonstrate purposeful discrimination by pointing to a law or policy that: (1) "expressly classifies persons on the basis of" a suspect classification; (2) "has been applied in an intentionally discriminatory manner[;]" or (3) "has an adverse effect

and . . . was motivated by discriminatory animus." *Brown v. City of Oneonta, N.Y.*, 221 F.3d 329, 337 (2d Cir. 2000) (internal quotation marks omitted).

Applying this standard yields only one result. When the DOJ Petitioners acted with discriminatory animus to merge the New York and INS lists, they ensured that Respondents would continue to be detained under draconian conditions, even though they knew there was no evidence connecting them to terrorism. This is the essence of an "adverse effect . . . motivated by discriminatory animus."

Likewise, when the MDC defendants, with discriminatory intent, referred to the Respondents as "Arabic assholes," "fucking Muslims," and "terrorists" in the same breath, *Turkmen*, 789 F.3d at 258; when they submitted a knowingly false report which insisted that they had subjected these Plaintiffs to harsh detention conditions based on their purported links to terrorism, *id.* at 256-57; and when they created and imposed exceptionally severe conditions for people they knew had no connection to terrorism, they produced an adverse effect that was "motivated by discriminatory animus."

For these reasons, the Second Circuit correctly held that Petitioners are not immune. The lower court did not struggle with this decision, nor should it have: neither the underlying law nor the facts at hand are complicated or controversial, and the straightforward application of the one to the other yields unsurprising results.

B. Even In the Wartime Context, Executive Officers Clearly May Not Act Against Prisoners or Detainees Based on Their Religion or Ethnicity Without the Most Compelling Justification—A Showing That Has Not Been Made

Viewing this case through the lens of wartime exigencies does not change the result. Indeed, there is another period and set of cases that provide particular support for Respondents' argument. Petitioners claim the national security context of this case is somehow "novel." Unfortunately, it isn't. On the contrary, it is distressingly similar to one of the most infamous episodes in U.S. constitutional history—the WWII Japanese American Internment.

Then as now, the country was attacked without warning by a nation or individuals identified with a specific racial or ethnic group. Then as now, the nation exploded in a paroxysm of fury and bigotry. Then as now, the law shared in the rage, and the federal government conceived, designed, and implemented a program that led to the detention of innocent or innocuous people based on protected features—then, race and national heritage; now, real or perceived ethnicity or religion.

Then as now, the government protested that its actions had nothing to do with its prisoners' race or protected classifications but were undertaken solely to ensure national security. *Compare* ***Korematsu***, 323 U.S. at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military

Area because of hostility to him or his race"); *with Turkmen v. Hasty*, 789 F.3d at 265 (Judge Raggi, concurring in part and dissenting in part) (policies in this case were "propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001.")

The *Korematsu* majority's assertion, however, was forcefully belied by the dissenters in that very decision. *See Korematsu*, 323 U.S. at 233 (Murphy, J. dissenting) (Internment "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism"); *see also Hirabayashi*, 320 U.S. at 111. Moreover, as noted above, the Internment has been officially repudiated as one of the most egregious violations of our nation's civil rights and liberties in the last century. Thus, in 1976, commemorating our nation's bicentennial, President Ford formally rescinded President Roosevelt's Executive Order 9066, and implored the nation to learn from its mistakes. Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976). In 1983, after an exhaustive review of the history and taking hundreds of public testimonies across the country, a specially-empowered Congressional Commission found:

> The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it–detention, ending detention and ending exclusion–were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese

> Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan.

U.S. Comm'n on the Wartime Relocation and Internment of Civilians, Congress of 1980, *Report: Personal Justice Denied*, at 18 (1982) (emphasis added). In 1988, Congress overwhelmingly passed, and President Reagan signed, the Civil Liberties Act of 1988, which adopted CWIRC's findings and issued a formal apology to the surviving internees. 50A U.S.C. § 1989a(a).

From 1983 to 1988, a series of federal court rulings vacated the convictions imposed on *amici's* fathers for defying the military orders that implemented the Internment. After considering the evidence, the lower courts found that in order to secure favorable judicial rulings, the government's highest officers deceived the courts, including this Court, through a deliberate campaign of suppression, misrepresentation, destruction and alteration of critical evidence demonstrating the overwhelming loyalty of the Japanese American people to this nation. *Korematsu*, 584 F. Supp. 1406; *Hirabayashi*, 828 F.2d 591 and 627 F. Supp. 1445; Order, *Yasui*, D. Or. Crim. No. C 16056, at 2. For their courageous stands against official racism and in defense of the Constitution, *amici's* fathers were each presented with the Presidential Medal of Freedom in 1998 (Fred Korematsu), 2012 (Gordon Hirabayashi) and 2015 (Minoru Yasui). https://www.whitehouse.gov/blog/2014/01/30/honoring-legacy-fred-korematsu; https://www.whitehouse.gov/campaign/medal-of-freedom.[5]

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[5] For an extensive examination of these cases, *see* Eric K. Yamamoto, et al., *Race, Rights and Reparation: Law and the Japanese American Internment* 221-310 (2013); Peter Irons,

Not surprisingly, many government officials repudiated and regretted their roles. *See, e.g.*, *Personal Justice Denied* at 18. Indeed, Chief Justice Warren, who forcefully advocated for the removal of Japanese Americans while California Attorney General, later "deeply regretted" his role in that tragedy:

> I have since deeply regretted the removal order and my own testimony advocating for it, because it was not in keeping with our American concept of freedom and the rights of citizens . . . It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts.

Warren, *The Memoirs of Earl Warren* 149 (1977) (emphasis added).

Accordingly, the fact that the Court upheld the exclusions in *Korematsu*, *Hirabayashi*, and *Yasui* provides no comfort to Petitioners. Like *Scott v. Sanford*, 60 U.S. 393 (1856) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), the wartime exclusion cases are part of the American "anticanon"—those cases "that all legitimate constitutional decisions must be prepared to refute." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). It comes as no surprise,

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Justice Delayed: The Record of the Japanese American Internment Cases 3-46 (1989).

therefore, that the Court and many of its members have denounced these cases, particularly *Korematsu*. *See id.* at 459-60 (collecting some of the repudiations by modern Supreme Court Justices). Indeed, the extent to which the wartime cases have been repudiated by the Court and its members may explain why none of the Petitioners rely on the decisions to support their actions.

To be sure, the interned Japanese Americans had done no wrong, while Respondents had committed minor immigration violations. Likewise, the wartime cases involved exclusion and long-term detention in desolate military camps, while the present case involves relatively shorter detentions under different severe conditions in an urban federal jail. But these are distinctions without a difference. The fact that Respondents may have been lawfully arrested does not legitimate all that followed, and nothing in the offense for which Respondents were arrested even plausibly justified the treatment they endured.

Likewise, no one credibly suggests that the cautionary admonition embodied in the rejection of the wartime cases should be read narrowly or confined to its facts. For that reason, we would consider it extraordinary for any executive officer to assert that *Korematsu*, *Hirabayashi*, and *Yasui* authorized subjecting a different group (say, Muslims) to a different set of abuses (say, prolonged solitary confinement) based on a different protected characteristic (say, ethnicity or religion), simply because they had overstayed their visas and were subject to lawful arrest. Nor would we expect the government to maintain that the illegality of such an action had not been

"clearly established." Thankfully, we do not need to wait for another *Korematsu* to recognize such an argument as incorrect.

Petitioners may theoretically be able to prove that their actions were legitimate. But before that judgment can be made, Petitioners' justification must be subjected to searching judicial scrutiny. As the Court recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507, 525, 530-531 (2004), "careful examination" is necessary in light of the very real "risk of erroneous deprivation of a citizens' liberty in the absence of sufficient process." The Court cited the lesson of "history and common sense" that "an unchecked system of detention carries the potential to become a means of oppression and abuse." *Id.* at 530 *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) ("Any retreat from the most searching judicial inquiry can only increase the risk of another such error [as in *Korematsu*] occurring in the future.")[6]

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[6] *Amici* respectfully disagree with the suggestion in *Adarand* that the Court subjected the government's asserted rationale for the Internment to the "most rigid scrutiny." *See* Yamamoto, et al., *Race Rights and Reparation* 410 (describing the "Court's deferential approach" that "signaled a hands-off role in reviewing alleged government war power excesses, including those detrimental to the most fundamental of democratic liberties"). Indeed, in granting Fred Korematsu's *coram nobis* petition, Judge Marilyn Hall Patel eloquently captured *Korematsu*'s perhaps most important lesson:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitu-

On the present record, when there has been no judicial inquiry, much less the "searching inquiry" demanded by the Court, the risk of "another such error" is far too great. The clearly established lesson of the wartime cases, therefore, is that the lower court must be affirmed; the case must proceed.

III. Because No Reasonable Officer Would Have Considered It Lawful to Target People Based on Their Religion or Ethnicity, Petitioners Are Not Entitled to Qualified Immunity, Even If the Context Were Novel

Petitioners cannot be immune even if the Court were to conclude the context here was "novel" in some relevant respect. In the half century since the Court announced the qualified immunity doctrine, it has never intimated that a "novel" setting, by itself, is sufficient to warrant an officer's immunity. On the contrary, the Court has consistently tied immunity to the behavior demanded of a reasonable officer. This jurisprudence yields an easily applied standard that the Court may adopt: An official who acts in a way that no reasonable officer would have considered lawful cannot be immune, regardless of whether the context

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> tional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms, our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu, 584 F. Supp. at 1420.

is "novel." The case should then be remanded to the lower courts for application of the standard.

A. The Qualified Immunity Doctrine Developed to Protect Reasonable Mistakes and is Not Distinct From the Demands Placed on a Reasonable Officer

The history of qualified immunity cannot be understood apart from the parallel history of 42 U.S.C § 1983. *See Pierson v. Ray*, 386 U.S. 547, 554-58 (1967); *cf. also Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("[t]he qualified immunity analysis is identical under [§ 1983 and *Bivens*]"). In relevant part, § 1983 renders liable "every person" who, under color of law, deprives another of the "rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (1986). Though the statute traces its lineage to the Civil Rights Act of 1871, it fell into almost immediate disuse until 1961, when the Court allowed individuals to sue state officers for violations of the Constitution that had not been sanctioned by the state itself. *Monroe v. Pape*, 365 U.S. 167 (1961); *Developments in the Law—Section 1983 and Federalism* (pt. 1), 90 HARV. L. REV. 1133, 1169 (1977).

Once *Pape* affirmed the right to sue state officials for constitutional violations, § 1983 became—and remains—the most important litigation weapon in the civil rights arsenal. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980) (§ 1983 liability imposed for bribing a judge to obtain an injunction); *Graham v. Connor*, 490 U.S. 386 (1989) (police officers liable under § 1983 for handcuffing, withholding treatment from, and injuring a diabetic entering a sugar coma); *Hudson v. McMillian*, 503 U.S. 1 (1992) (corrections officers

liable under § 1983 for beating a handcuffed and shackled inmate, loosening his teeth, and cracking facial bones).

But § 1983 also became the most popular litigation weapon. From 1966 to 1987, the number of civil rights actions increased nearly 2,000 percent. Douglas A Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 936 (1990). And by 1995, § 1983 claims comprised around 10 percent of all federal civil suits. Roger A. Hanson & Henry W. K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* iii (1995). This deluge seemed to indicate that the lower courts were reading the statute too broadly, and that executive officers risked liability even for reasonable mistakes.

The Court first tried to stem this tide in *Pierson v. Ray*, 386 U.S. 547 (1967), which involved the arrest of a group of clergymen in Jim Crow Mississippi. The Petitioners sued the officers, alleging they had been arrested without probable cause. The lower court denied defendants' motion to dismiss, reasoning that *Pape* had eliminated immunity doctrines. *Pierson*, 386 U.S. at 550-51. The Court reversed, holding that police officers were immune from damages for an unlawful arrest if they believed, reasonably and in good faith, in the legality of their actions at the time. *Id.* at 557. Seven years later, the Court extended *Pierson* to all executive officers, making them liable only for unreasonable or ill-willed constitutional violations. *Schuer v. Rhodes*, 416 U.S. 232 (1974).

But the "good faith immunity" test also proved inadequate. The lower courts became inundated with

"insubstantial" claims of constitutional wrong that survived pretrial motions based on alleged bad faith by executive officers. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Because bad faith is almost invariably a question of fact, qualified immunity ceased to protect reasonable mistakes by executive officers. *Id.* at 816-18.

In response, the Court replaced the subjective "good faith" standard with an ostensibly objective inquiry into notice, *i.e.*, that the legal principle the plaintiff relied on had been "clearly established" at the time the officer acted. *Harlow*, 457 U.S. at 801. Although observing that a government officer could not "reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful," *id.* at 818, the Court has also made clear that a right is clearly established when its "contours" are "sufficiently clear" to a reasonable officer. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Applying this standard, the Court has consistently immunized reasonable mistakes. In *Wilson v. Layne*, 526 U.S. 603 (1999), for instance, law enforcement officials allowed a photographer to accompany them during the execution of an arrest warrant, where he photographed the Petitioner during the protective sweep, though the pictures were never published. *Id.* at 607-08. Although deciding that the "media ride-along" ran afoul of the Fourth and Fourteenth Amendments because it violated the "sanctity of the home," *id.* at 610, 614, the Court also held that the officers were immune

because the illegality was not immediately apparent, and a reasonable officer could not have been expected to know the Court would interpret the Constitution as it did, *id.* at 615.

On the other hand, the Court has just as consistently refused to immunize behavior that no reasonable officer would have considered lawful. In *Groh v. Ramirez*, 540 U.S. 551 (2004), for example, a police officer relied on a warrant that failed to specify the items to be seized, in violation of the particularity requirement of the Fourth Amendment. The Court held that the officer was not entitled to qualified immunity. "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . [E]ven a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* at 563-64.

In summary, the history of the qualified immunity doctrine reveals the Court's consistent attempt to balance the plaintiff's sword against the defendant's shield. Whenever the former has become too powerful, the Court has strengthened the latter to ensure that executive officials are not punished for their reasonable choices. At the same time, the Court has never allowed qualified immunity to protect conduct that no reasonable officer would have considered lawful. The qualified immunity doctrine has always tried to strike a balance that imposes accountability for unreasonable violations while protecting reasonable mistakes, regardless of the context in which the viola-

tion arose. *E.g.*, *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011) (qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments").

Ignoring this history, Petitioners argue that "clearly established" means factually identical, without regard to whether the violation would have been obvious to any reasonable officer. Petitioners Ashcroft and Mueller, for instance, fault Respondents for failing to identify "any decision indicating, much less clearly establishing as of late 2001, that continuing to apply the hold-until-cleared policy to aliens on the New York list was so arbitrary or purposeless to national security as to be unconstitutional." Brief for Petitioners at 33, *Ashcroft v. Abbasi, et al.*, (No. 15-1359) (internal citations omitted). Of course, the hold-until-cleared policy and the New York list did not exist prior to late 2001. Under Petitioners' theory, no conduct, regardless of how unreasonable, could overcome a qualified immunity defense.

This is emphatically not the law. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *United States v. Lanier*, 520 U.S. 259, 269 (1997) (right can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights").

Contrary to Petitioners' argument, the Court has never suggested that a bare assertion of "novelty" can

immunize behavior that no reasonable officer would have considered lawful. Rather, the Court has always carefully tethered the permissible scope of qualified immunity to the conduct expected of a reasonable executive official. This connection was explicit in the good faith immunity standard of *Pierson* and *Schuer*. *Pierson*, 386 U.S. at 555; *Schuer*, 416 U.S. at 247-48. But it did not disappear when the Court adopted the "clearly established" test.

In *Anderson*, for instance, the Court explained that the "clearly established" standard exists to immunize behavior that "reasonably could have been thought consistent with the rights they are alleged to have violated," and emphasized that a right is clearly established if "every reasonable official would have understood that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 648. Likewise, in *Saucier v. Katz*, the Court indicated that the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." 533 U.S. 194, 202 (2001).

Though the Court has strongly hinted at this test, it has never explicitly adopted it. The Court should take this opportunity to clarify that officials cannot be immune if at the time they acted no reasonable officer would have considered it lawful to do as they did. Courts use the "no reasonable person" benchmark frequently and the more generic "reasonable person" is a nearly ubiquitous element of American jurisprudence. Thus, there should be no confusion or additional learning curve in its application.

In addition, the standard will ensure that no officer can lose immunity "as long as their actions reasonably could have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 648. This was the Court's main concern in developing the qualified immunity doctrine, and a concern that will be more consistently protected under the proposed rule than under the current regime of ad hoc analogy.

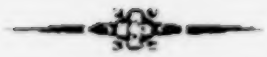
B. If Adopted, The Court Should Remand for Application of the "No Reasonable Person" Standard

Because a new standard involving factual considerations should be applied in the first instance by the lower courts, the Court should remand for application of the "no reasonable person" standard. Should the Court wish to apply it, however, the outcome is clear: No reasonable officer would have considered it lawful to act against Respondents simply because they are perceivably Arab or Muslim, and Petitioners cannot be immune.

Thus, Ashcroft, Mueller, and Ziglar should not receive qualified immunity from the due process claims because they authorized the merger of the New York List and the INS List, resulting in detention under the "most restrictive conditions" of individuals who were of no interest to the FBI. It beggars belief to suggest that a reasonable officer would have believed in late 2001 that the law allowed her to detain people in whom the FBI had no interest under the sort of conditions that prevailed in this case. For the same reason, these Petitioners cannot be immune from the equal protection claims.

No reasonable officer could have believed people could be held for continued detention and mistreated solely because they appeared to be Muslim or Arab.

Nor should Hasty and Sherman be immune. They deliberately created and maintained exceedingly severe conditions of confinement, including long-term solitary confinement, despite knowing that Respondents violated no regulation, posed no risk, and had no connection to terrorism. No reasonable officer would have believed in late 2001 that it was appropriate to subject detainees to the ADMAX SHU's harsh conditions solely on account of a detainee's religion or ethnicity.



CONCLUSION

The judgment of the court of appeals in favor of Respondents should be affirmed.

Respectfully submitted,

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